92-1695

NO. _____

Supreme Court, U.S.
APR 2 6 1993

IN THE

Supreme Court of the United States

OCTOBER TERM, 1992

UNITED STATES OF AMERICA, *ex rel.*
KREINDLER & KREINDLER,

Petitioner,

—v.—

UNITED TECHNOLOGIES CORPORATION,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether a law firm which investigated and uncovered a Government contractor's fraud in the course of a prior civil action against the contractor is barred from bringing a False Claims Act suit under 31 U.S.C. § 3730(e)(4) on the ground that the contractor filed in court some of the discovery information from the prior civil action which had been previously provided to the law firm in response to its civil discovery requests.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Second Circuit is reported at 985 F.2d 1148 (2d Cir. 1993). It affirmed, on other grounds, the decision of the United States District Court, Northern District of New York, reported at 777 F.Supp. 195 (N.D.N.Y. 1991).

JURISDICTION

The judgment of the Court of Appeals was entered on January 22, 1993. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

PROVISION OF LAW INVOLVED

This case raises the interpretation of the following subject matter jurisdiction provision of the False Claims Act:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. § 3730(e)(4).

STATEMENT OF THE CASE

This is an action brought under the False Claims Act, 31 U.S.C. § 3729 *et seq.* (hereafter "FCA"), which permits a private person, as a *qui tam* plaintiff or relator, to bring a civil action for the person and the United States to recover funds from a Government contractor who has presented fraudulent or false claims for payment to the Government.

Petitioner Kreindler & Kreindler (hereafter "Kreindler") is a law firm. In 1983, Kreindler brought an action against United Technologies Corporation (hereafter "UTC") on behalf of Audrey Bryant for damages arising from the death of her husband, United States Army Warrant Officer Charles Bryant, in the 1982 crash of a UTC Black Hawk helicopter at Fort Campbell, Kentucky. *Bryant v. United Technologies Corporation*, 83 Civ. 992 (N.D.N.Y.). In the course of this litigation, Kreindler investigated and discovered UTC's presentation of false claims for payment under its Black Hawk helicopter contract with the United States Army.

At UTC's insistence, discovery in the *Bryant* civil action was subject to a blanket stipulation protective order which required confidentiality and nondisclosure of all documents and information.

The basis of Kreindler's claim that UTC presented false claims for payment involved a contract the Army awarded to UTC in 1976 to build a fleet of quick deployment helicopters, dubbed the Black Hawk. A key Army specification was that the new helicopter have rotor blades which could be folded to allow for transport aboard cargo aircraft. To meet mission requirements, the Army specified that the blade-fold be performed within a set time, without disconnection of internal flight controls or the use of maintenance technicians.

To secure the contract, UTC represented to the Army that the Black Hawk would use blade-fold pins to permit rapid blade-fold without disconnection of the flight controls.

After the contract award, however, UTC abandoned the blade-fold pins. Discovery revealed that the pins were deleted because of engineering mistakes by UTC, which were left uncorrected. As a result, the helicopter could not meet the rapid deployment criteria specified by the contract. Each time the blades were folded, the flight controls had to be disconnected by an Army mechanic in a time-consuming procedure.

Kreindler learned from an applicable federal defense regulation and consultation with UTC's retired Chief Engineer that

UTC was required to advise the Army that the pins had been deleted from the design by submitting a formal "Class I" contract change for approval by the contracting officer at the Army Aviation System Command (AVSCOM) in St. Louis, Missouri.

Kreindler also learned from its investigation through Army officials, conducted apart from the *Bryant* discovery, that UTC never sought the required Class I approval from the contracting officer for abandonment of the pins. Such a request could have led to costly design changes, a contract price renegotiation or loss of the contract altogether.

Instead, UTC violated the contract and sold the Army over 700 Black Hawks without blade-fold pins, and submitted false claims for payment, verifying that a fully conforming helicopter had been delivered.

UTC actively concealed its unilateral design changes from the Army officials responsible for the Black Hawk contract. In 1979, shortly after the first helicopter was delivered under the contract, the control systems of four Black Hawks sustained cracked bearings. This was caused by loads placed on the bearings during the blade-fold process because of the lack of blade-fold pins.

UTC falsely told the Army that the cracked bearings were caused by the bearings' design. UTC knew, however, the cracking was caused by blade-fold loads and the lack of blade-fold pins.

UTC routed instructions to Army technical and maintenance personnel to disconnect the flight control systems during the blade-fold process to avoid placing loads on the bearings. These personnel, however, had no authority to modify the contract. UTC was required to submit a Class I change for formal AVSCOM approval, because the disconnection of the flight controls necessitated by the lack of pins sacrificed the Black Hawk's performance and basic mission, and violated the contract requirements.

UTC's abandonment of the pin design caused a series of Black Hawk crashes. Officer Bryant was killed in 1982 when the control bearings on his helicopter failed in flight. The bearings had been previously damaged during blade-folding operations. After that crash, four other Black Hawk helicopters crashed following control system failures.

UTC's design chief Harold Heiney admitted in a deposition conducted in the *Bryant* action that absent blade-fold pins there was a significant risk of a fatal catastrophe caused by damage to the control system during blade-folding. Kreindler also independently consulted with Ralph Lightfoot, UTC's retired Chief Engineer, who testified that UTC's failure to include pins was a contract violation which rendered the helicopter dangerous.

Throughout the discovery in *Bryant*, UTC steadfastly maintained that the pins were not a contract requirement. In November 1986, UTC moved for summary judgment in *Bryant*, pursuant to the Government contractor defense, contending it had complied with all Government specifications and the Government approved all changes to the contract. UTC attached as exhibits to its motion some of the discovery produced in the litigation. UTC filed the motion and the exhibits with the court. The *Bryant* plaintiff filed her response to the motion and also attached discovery material as exhibits. This is the first time any UTC discovery documents were filed with the court.

In addition, UTC filed its responses to Kreindler's interrogatories and requests for admissions. In these documents UTC denied that blade-fold pins were a contract requirement.

Everything that UTC filed with the court had already been in Kreindler's possession. Nothing that UTC filed was directed at the public disclosure of an allegation or transaction of fraudulent or false claims for payment.

The District Court denied UTC's summary judgment motion and in July 1987 the *Bryant* action was settled.

Course of Proceedings and Dispositions Below

On December 30, 1987, Kreindler filed the instant False Claims Act action in the same District Court in which the *Bryant* action had been filed.

In 1990 UTC filed four case-dispositive motions before the District Court: a motion to dismiss based on the unconstitutionality of the FCA and Kreindler's lack of standing; a motion to dismiss on statute of limitations grounds; a motion to dismiss because the action was barred by the *Bryant* settlement and protective order; and a motion to dismiss for lack of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4).

On November 13, 1991, the District Court entered a memorandum decision and order and ruled that Kreindler had standing to bring suit, but was barred by the FCA statute of limitations. The District Court did not rule on the remaining motions.

On appeal to the Second Circuit Court of Appeals, that court affirmed the District Court's ruling that the FCA does not violate the standing requirements of Article III of the Constitution.

The Second Circuit disagreed with the District Court's determination that Kreindler was barred by the FCA statute of limitations, and then ruled on what it considered to be the dispositive issue of the appeal—the issue of subject matter jurisdiction under 31 U.S.C. § 3730(e)(4). The court ruled that a public disclosure in a "civil hearing" within the meaning of § 3730(e)(4)(A) occurred because discovery information which formed some part of Kreindler's *qui tam* action was filed in court by UTC in the *Bryant* civil suit.

Disregarding Kreindler's role as the investigator of UTC's fraud and the entity which caused UTC to disclose its documents and information, the Second Circuit ruled that Kreindler was not an original source, because UTC was the entity which made the public disclosures and it and its employees were the original sources of the information disclosed to Kreindler.

Plaintiff Kreindler respectfully petitions this Court for a writ of certiorari to review the decision below.

ARGUMENT

CERTIORARI SHOULD BE GRANTED TO RESOLVE THE CONFLICT AMONG THE CIRCUIT COURTS CONCERNING THE TYPE OF ACTIONS CONGRESS MEANT TO BAR UNDER SECTION 3730(e)(4) AND TO REVIEW THE SECOND CIRCUIT'S SERIOUS DEPARTURE FROM CONGRESS' INTENT TO BAR ONLY "PARASITIC" SUITS AND ITS DEFEAT OF CONGRESS' PURPOSE TO EXPAND THE FCA *QUI TAM* PROVISIONS TO ALLOW SUITS BY THOSE WHO INVESTIGATE AND UNCOVER FRAUD AGAINST THE GOVERNMENT.

The decision below defeats Congress' intent to reform the *qui tam* provisions of the FCA to enlarge private citizen involvement in the Government's anti-fraud effort and to rectify prior restrictive judicial interpretations which had severely curtailed the scope of eligible *qui tam* plaintiffs.

The Second Circuit decision rewrites and impermissibly expands § 3730(e)(4) to permit Government contractors unilaterally to preempt FCA suits by private citizens who investigate them in the course of a civil litigation, simply by filing in court documents and information from civil litigation provided in response to discovery requests, whether or not the information even constitutes an allegation or transaction of fraud. This absurd result was not intended by Congress.

The decision below wholly ignores the statute's requirement that there be "a public disclosure of *allegations or transactions*." It ignores that the statutory language "civil hearing" is not coterminous with "civil suit." It ignores the legislative history demonstrating that the disclosure which triggers the bar to suit is one made in a Governmental hearing, investigation, report or audit. And, most nonsensically of all, it ignores that when there is a public disclosure, the "original source"

Congress intended could bring suit is the person who investigated and uncovered the fraud prior to and independently of the public disclosure.

Some circuit courts agree with the Second Circuit that discovery filed in a civil suit can bar a FCA action. *See, e.g., United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991) (hereafter "*Prudential*"); *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S.Ct. 1364 (1993); *Houck on behalf of the United States v. Folding Carton Admin. Committee*, 881 F.2d 494 (7th Cir. 1989), *cert. denied*, 494 U.S. 1026 (1990). Some circuit court decisions appear to agree with the Second Circuit's definition of "original source." *See, Prudential*, 944 F.2d at 1160-61; *Wang*, 975 F.2d at 1419.

However, conflict does exist among the circuits on the "public disclosure" and "original source" requirements. The First Circuit in *United States ex rel. LeBlanc v. Raytheon Co., Inc.*, 913 F.2d 17 (1st Cir. 1990), *cert. denied*, 111 S.Ct. 1312 (1991), in agreement with the legislative intent, held that Section 3730(e)(4)(A) "prohibits courts from hearing *qui tam* actions based on information made available to the public during the course of a *Government hearing, investigation or audit* or from the news media." *Id.* at 20 (emphasis added). On the "original source" definition, the Seventh Circuit in *Houck* held that a plaintiff is not an original source if he would not have learned of the fraud "absent public disclosure," thus establishing that a plaintiff is an original source when he learns of the fraud independently of a public disclosure.[1] Under these interpretations, Petitioner's action would not have been barred.

The confusion and conflict in the circuit courts arises because the meanings of "public disclosure" and "original

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1 The Ninth Circuit in *Wang* also held that an original source is one who learned of the fraud independently of the public disclosure, but agreed with the Second Circuit that an original source must also meet the "implied" requirement of having been the entity which caused the disclosure.

source" and the precise types of actions Congress meant to bar are not clear. *See e.g.*, *Prudential*, 944 F.2d at 1157.

Despite the ambiguity of the terms "public disclosure" and "original source," the Second Circuit interpreted these terms without the aid of legislative history, in a manner contrary to the legislative intent, and in a way which produces absurd results.

To determine the meaning of a statute a court must "look not only to the particular statutory language, but to the design of the statute as a whole and to its object and policy." *Crandon v. United States*, 494 U.S. 152, 158 (1990). This Court has stated: "we look first to the statutory language and then to the legislative history if the statutory language is unclear." *Blum v. Stinson*, 465 U.S. 886, 896 (1984). Above all, "interpretations of a statute that would produce absurd results are to be avoided if alternative interpretations consistent with the legislative purpose are available." *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 575 (1982). When the language being construed is an enumerated exception to a statutory provision, "additional exceptions are not to be implied, in the absence of a contrary legislative intent." *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980).

A purpose of the 1986 FCA amendments was to enhance the *qui tam* provisions to encourage greater assistance from the private citizenry to bolster the Government's anti-fraud efforts. Senate Report No. 99-345, *reprinted in* 1986 U.S. Code Cong. & Ad. News 5266, 5273, 5288-99 (hereafter "S.R. No. 99-345").

Tempering Congress' intent to expand the *qui tam* provisions was a concern to maintain the bar on the "parasitic" suit this Court held was permitted under the pre-1943 statute. *United States ex rel. Marcus v. Hess*, 317 U.S. 537 (1943). In *Hess*, this Court ruled that the Act as then written did not bar a plaintiff from bringing a FCA action based on allegations in a criminal indictment, even when the plaintiff brought no information

of his own to the lawsuit. This ruling prompted amendments in 1943 to preclude a *qui tam* suit based on information in the Government's possession.

The 1943 amendments resulted in numerous restrictive and severely criticized judicial decisions, the most notorious of which was *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984). In *Dean* the State of Wisconsin was not allowed to maintain a *qui tam* action based on information it gathered in its own investigation of Medicaid fraud, because the State had supplied the Government with the information prior to filing suit, as required under the Medicaid regulations. *Id.* at 1103. In June 1984, the National Association of Attorneys General urged Congress to rectify this problem. *See*, Resolution II, National Association of Attorneys General (June 1984) *reprinted in* 131 Cong. Rec. 24483 and discussed in S.R. 99-345 at 5278.

Responding to the plea, Senator Grassley introduced the False Claims Reform Act, S.1562, on August 1, 1985. Congress desired to maintain the bar on the true parasitic *Hess*-type suit, but lift the bar imposed on the *Dean*-type suit in which the plaintiff itself investigated and uncovered the fraud. *See*, S.R. 99-345 at 5269, 5275-78.

On August 11, 1986, Senator Grassley introduced "minor changes" to the *qui tam* provisions reported out of the Judiciary Committee and for the first time introduced the "original source" requirement. 132 Cong. Rec. S20531 (Aug. 11, 1986).

The proposed provision read:

> (5)(A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil or administrative hearing, a congressional administrative, or Government Accounting Office report, hearing, audit or investigation or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.

Id.

The contemporaneous comments of Senator Grassley provide the best available insight to the meaning of "public disclosure" and "original source":

> This amendment seeks to assure that a qui tam action based solely on public disclosures cannot be brought by an individual with no direct or independent knowledge of the information *or* who had not been an original source to the entity that disclosed the allegations.
>
> In the definition of "original source," the requirement that the individual "voluntarily" informed the Government or news media is meant to preclude the ability of an individual to sue under the qui tam section of the False Claims Act when his suit is based solely on public information and the individual was a source of the allegations *only because the individual was subpoenaed to come forward. However, those persons who have been contacted or questioned by the Government or the news media and cooperated by providing information which later led to a public disclosure* would be considered to have "voluntarily" informed the Government or media and therefore considered eligible qui tam relators.
>
> *The use of the term "Government" in the definition or original source is meant to include any Government source of disclosures cited in subsection (5)(A)*; that is, Government includes Congress the General Accounting Office, any executive or independent agency *as well as all other governmental bodies that may have publicly disclosed the allegations.*

> The amendments also limit the possible portion of the judgment recoverable by a qui tam plaintiff to 10 percent or less when the action is based primarily on public information. *This limitation will affect those persons who have brought a qui tam action based almost entirely on information of which they did not have independent knowledge but had derived from a public source.*

132 Cong. Rec. S20536 (Aug. 11, 1986) (emphasis added).

Senator Grassley's statement demonstrates that the "public disclosure" which operates as a potential bar is a Governmental disclosure and that an "original source" is someone who does not derive his or her information from the public disclosure, but has learned it independently of that disclosure.

Specifically, the statement that the term "Government" within the "original source" subparagraph was coterminous with Government sources of disclosures in subparagraph A establishes that the public disclosure is one made by a Government entity as defined in subparagraph A or the news media. Senator Grassley added the requirement that the original source have voluntarily informed the Government entity which disclosed the information or the news media solely to preclude a suit by one subpoenaed by the *Government* and therefore compelled to come forward with information in a *Government* investigation which later lead to a public disclosure. Without interpreting subsection A as barring actions based on Governmental public disclosures, the subsection B definition for original source makes little sense.

The last quoted paragraph concerning the award to a *qui tam* plaintiff who bases a suit on public information establishes that the *qui tam* plaintiff who lacks independent knowledge is the one who derives his knowledge solely from the public disclosure itself.

Also, by stating that one does not qualify as an original source without either direct or independent knowledge of the information "or" without having been the source to the entity that disclosed the allegations, Senator Grassley obviously intended that an original source could be one who has direct and independent knowledge, but does not also have to be the source to the Government entity that disclosed the allegations. If the latter were the only qualifying original source, the statute could easily have stated so.

On October 3, 1986, Senator Grassley introduced the final changes to the "original source" language. 132 Cong. Rec. S28576 (Oct. 3, 1986). Subsection (B), in its final form, now read:

> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

The provision removed the requirement that the original source have voluntarily provided his or her information to the news media. Given Senator Grassley's prior explanation that the voluntary disclosure requirement prevented a Government subpoenaed witness from qualifying as an original source, the deletion of the media from this requirement makes sense. The news media obviously does not subpoena witnesses.

Because there was no further change to the "public disclosure" paragraph, Senator Grassley's previous statement that the reference to Government in paragraph B relates back to and is coterminous with the Government entities delineated in paragraph A, continues to instruct that the public disclosures contemplated in subparagraph A are those made in a Governmental hearing, investigation, audit or report.

In submitting legislative history in support of the House's adoption of the Senate version of the amendments, Represen-

tative Berman stated his understanding that the preemptive public disclosure is one made in the course of a Government investigation, that an original source need only have independent knowledge prior to the public disclosure of some of the information on which the FCA suit is based, and that the original source need not be the source to the entity making the public disclosure:

> Before the relevant information regarding fraud is publicly disclosed *through various government hearings, reports and investigations which are specifically identified* in the legislation or through the news media, any person may file such an action as long as it is filed before the government filed an action based upon the same information. Once the public disclosure of the information occurs through one of the methods referred to above, then only a person who qualifies as an "original source" may bring the action. *A person is an original source if he had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed.*[2]
>
> * * *
>
> The only exception to this minimum 15% recovery is in the case where the information has already been disclosed and the person qualifies as an "original source" but *where the essential elements of the case were provided to the government or news media by someone other than the qui tam plaintiff.* In that case, the court may award up to 10% of the total recovery to the qui tam plaintiff.

132 Cong. Rec. H29322 (Oct. 7, 1986) (emphasis added).

Nothing in this legislative history supports the decision below.

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2 This legislative history was apparently written prior to the Senate amendment deleting the requirement that the original source have voluntarily provided information to the news media in cases of a media public disclosure.

A.

The Decision Below is Contrary to Congress' Intent to Bar Only Those Actions Based on Governmental or Media Disclosures of Allegations or Transactions of Fraud.

Before reaching the issue of whether a *qui tam* plaintiff is an original source, there must first be a finding that there has been (1) a "public disclosure of allegations or transactions"; (2) which occurred through one of the enumerated methods set forth in subparagraph A; and (3) that the plaintiff's action is "based upon" that public disclosure. *See, United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1499-1500 (11th Cir. 1991).

The Second Circuit erred when it failed to analyze whether there was a public disclosure of *allegations or transactions*. The Ninth Circuit in *Wang* noted that courts have incorrectly read the statutory requirement of publicly disclosed *allegations or transactions* as if the requirement generally barred suits based merely on publicly disclosed information. 975 F.2d at 1418. The *Wang* court correctly held that the two phrases are not interchangeable:

> But the Act bars suits based on publicly disclosed "allegations or transactions," not information. . . . § 3730(e)(4)(A). The point is not mere semantics; the Act distinguishes between "allegations" and the "information on which the allegations are based." . . . § 3730(e)(4)(B). The Act appears to be invoking the common logical distinction between an assertion and its proof.

Id. at 1418.

The distinction is critical in this case, because, even assuming that the disclosure involved here meets the remainder of the public disclosure requirements, the civil discovery materials filed in *Bryant* were not sufficient for anyone to conclude that

they constituted a disclosure of allegations or transactions of a fraud.[3]

The very nature of UTC's misconduct, the concealment of a significant contract deviation, assured that its own documents and admissions would not disclose, directly or indirectly, any fraudulent or false claim for payment. A person stumbling upon the *Bryant* civil lawsuit court file would not be able to glean from it that UTC submitted false claims for payment to the government. Nonetheless, the Second Circuit made no distinction between disclosure of "allegations" and "information" and merely held that a preemptive public disclosure occurred because "the *information* was . . . available to anyone who wished to consult the Court file." 985 F.2d at 1158 (emphasis added).

The Second Circuit also erred in holding that a § 3730(e)(4)(A) public disclosure of allegations within a "civil hearing" occurs whenever a party files discovery materials in a private civil litigation. The court so held without ever addressing the differences between the statutory phrase "civil hearing" and "civil litigation" or "civil suit" and without reconciling the contradictory legislative history demonstrating that Congress intended to bar suits in which the fraudulent allegations or transactions were disclosed in a *Governmental* hearing, report or investigation or through the news media.

The Second Circuit simply adopted the Third Circuit's rationale in *Prudential*, 944 F.2d at 1155-58. The *Prudential* majority admitted that it had no explanation for Congress' use of the phrase "civil hearing" in § 3730(e)(4)(A), especially when in other sections of the statute Congress used the more expansive terms "civil suit" or "civil proceeding." *Id.* at 1157. Having no explanation, the court decided to treat "hearing" as the equivalent of "suit." *Id.*

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3 Indeed, what UTC contended its documents and information proved was that there had been compliance with the Army contract, the Army approved all the changes to the contract and there was never a contract requirement for blade-fold pins.

To equate "civil hearing" with "civil action" or "civil suit" is to broaden the plain meaning of "hearing" and impermissibly enlarge the statutory exception in § 3730(e)(4)(A), in contravention of statutory construction rules and Congressional intent. *See*, *Andrus v. Glover Constr. Co.*, 458 U.S. at 575 (absent clear legislative intent, courts can not enlarge enumerated exceptions within a statute).

It is clear from the meaning of the words "hearing," "suit" and "action" that while the latter two are interchangeable and refer to litigation brought in a court of law, "hearing" has a narrower meaning as a public proceeding in which evidence is heard to determine an issue.[4] Black's Law Dictionary also points out that "[h]earings are extensively employed by both legislative and administrative agencies and can be adjudicative or merely investigatory." The plain meaning of the term "civil hearing," then, is not coextensive with "civil action" or "civil suit."

A reading of the Act as a whole establishes that Congress did not intend that these terms be interchangeable. In another provision also setting forth a jurisdictional exception, Section 3730(e)(3), Congress used the more comprehensive term "civil suit," indicating that "when Congress wished to cover an area

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4 Black's Law Dictionary, (6th ed.), defines the terms as follows:

Hearing. "A proceeding of relative formality (though generally less formal than a trial), generally public, with definite issues of fact or of law to be tried, in which witnesses are heard and evidence presented. It is a proceeding where evidence is taken to determine issue of fact and to render decision on basis of that evidence."

Suit. "A generic term, of comprehensive signification, referring to any proceeding by one person or persons against another or others in a court of law in which the plaintiff pursues, in such court, the remedy which the law affords him for the redress of an injury or the enforcement of a right, whether at law or in equity. . . Term 'suit' has generally been replaced by term 'action'; which includes both actions at law and in equity. . . See also Action; Cause of Action; Litigation; Proceeding." [citations omitted].

Action. "Term in its usual legal sense means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law. . . See also. . . Civil Action; . . . Proceeding; Suit;. . . ." [citation omitted].

broadly, it knew how to do so," and in fact did so. *United States ex rel. Stinson v. Pilot Life Insurance Co.*, No. C-90-29-G, 1991 WL 210885 (M.D.N.C. Aug. 6, 1991). Thus, "[o]ne can infer that if Congress wished to bar suits based on public disclosures arising out of any stage or aspect of a criminal, civil or administrative litigation or hearing, it would have chosen the more expansive terms of 'suit', 'litigation', or 'proceeding', in § 3730(e)(4)(A) instead of using the word 'hearing.' " *Id.*

The result below clearly violates the rule of construction that "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983), *quoting United States v. Wong Kim Bo*, 472 F.2d 720, 722 (5th Cir. 1972).

Congress intentionally used the phrase "civil, criminal or administrative hearing," and not "civil, criminal or administrative action or suit," because it intended that § 3730(e)(4)(A) bar only actions based upon public disclosures within a *Governmental* hearing, investigation, audit or report. *See*, discussion *ante* at p. 11-14; 132 Cong. Rec. S20536 (Aug. 11, 1986) (Statement of Senator Grassley that the use of the word Government within the original source definition referred back to the Governmental bodies in subsection A that disclosed the allegations); 132 Cong. Rec. H29322, (Oct. 7, 1986) (Statement of Rep. Berman that any person can file a *qui tam* action "[b]efore the relevant information regarding fraud is publicly disclosed through various Government hearings, reports and investigations which are specifically identified in the legislation or through the news media").

The First Circuit agrees with this reading of the legislative intent. In *LeBlanc*, 913 F.2d 17, the court held that the "logical reading [of § 3730(e)(4)(A)] is that the subsection serves to prohibit courts from hearing *qui tam* actions based on information made available to the public during the course of a

Government hearing, investigation or audit or from the news media." *Id.* at 20.

This reading maintains Congress' intent to bar the *Hess*-type parasitic suit, because a criminal indictment is a public disclosure of allegations and transactions resulting from a criminal [Grand Jury] hearing. That the hearing itself is not public is irrelevant, for what § 3730(e)(4)(A) requires is that the *allegations* be publicly disclosed. The other parasitic suit Congress meant to foreclose was one based on allegations and information the Government already possesses, when the plaintiff did not contribute to the disclosure of the allegations. *See*, 132 Cong. Rec. H22340 (Sept. 9, 1986) (Statement of Rep. Glickman).

With these exceptions, Congress made the conscious decision to allow *qui tam* suits for the benefit of the public treasury, for without the *qui tam* suit, there will often be *no* recovery for the Government. *See, e.g.*, S.R. 99-345 at 5293.

Accordingly, the Second Circuit erred in concluding that a public disclosure of allegations of fraud had occurred and that it occurred by one of the methods delineated in § 3730(e)(4)(A).

The bar in § 3730(e)(4)(A) of an action "based upon" a public disclosure of allegations or transactions, plainly read, means only that an action which *republishes* allegations made publicly is barred unless the plaintiff is an original source. Inasmuch as there were no public disclosures of UTC's fraud or false claims for payment, and certainly none via a method enumerated in the section, Kreindler's suit was not a republishing of fraud. Rather, it was the *first* publishing of UTC's fraudulent or false claims for payment, and the court below erred in construing Kreindler's suit to have been based on publicly disclosed allegations within the meaning of § 3730(e)(4)(A).

B.

The Second Circuit Ruling on "Original Source" Produces the Absurd Results of Barring Suit by the Person who Investigates and Uncovers the Fraud and Allowing a Defendant Unilaterally to Preempt a FCA Suit.

Under Second Circuit decisional law to qualify as an "original source" under § 3730(e)(4)(B), a plaintiff must satisfy the two statutory requirements and an additional requirement by implication. The decision below adopted the previous holding in *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990) that:

> "[a] straightforward reading of § 3730(e)(4)(B) indicates that to be an 'original source' a *qui tam* plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based, and (2) have voluntarily provided such information to the government prior to filing suit. A close textual analysis combined with a review of the legislative history convinces us that under § 3730(e)(4)(A) there is an additional requirement that a *qui tam* plaintiff must meet in order to be considered an 'original source, namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based."

985 F.2d at 1159, *quoting*, *Dick*, 912 F.2d at 16.[5]

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5 The decision below did not address the original source requirement of voluntary disclosure to the Government. As stated *ante* at p. 11-12, Senator Grassley introduced this requirement solely to prevent the unseemly result of rewarding an individual who has been compelled by the Government to come forward with information. 132 Cong. Rec. S20536 (Aug. 11, 1986). His comments on this requirement demonstrate that the only way to read subsections A and B in a harmonious and logical manner is to read subsection A as only barring suits based on Governmental public disclosures and subsection B as excluding plaintiffs who were compelled by the Government to testify. The requirement of a "voluntary" disclosure to the Government is irrelevant in this case because there has been no Governmental disclosure. In

The first requirement of "direct and independent knowledge" is susceptible of more than one reading. Direct could mean as a direct result of plaintiff's investigation, or it could mean that the plaintiff must have first-hand knowledge. Independent could mean that the plaintiff has learned of the fraud prior to and independently of the public disclosure, or it could mean that the information plaintiff knows must be independent of and different from that publicly disclosed. The only meaning consistent with Congress' intent to overrule *Dean* is that a plaintiff is an original source when as a direct result of his or her own investigation, he or she has learned of the fraud prior to and independently of a public disclosure.

The Seventh Circuit adopted this reading in *Houck*, 881 F.2d 494, when it held that plaintiff's knowledge of the information was "direct" in that he assisted claimants in recovering money out of a settlement, but it was not independent in that "[t]here is no evidence to indicate *Houck* would have learned of the claims to the funds absent public disclosure." *Id.* at 505. Conversely, a person is an original source when through his or her direct investigation he or she learns of the information on which the allegations are based, prior to and separately from the occurrence of a public disclosure. *See, e.g., United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F.Supp. 624, 630-31 (N.D. Ill. 1992) (State of Illinois was an original source because it directly conducted an investigation into the contractors' fraudulent practices and did not simply stumble across an interesting court file.)

This reading of "direct and independent" meets the Congressional intent to rectify the harsh result in *Dean*.[6] The Sec-

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any case, the wrong which Congress meant to prevent, a *qui tam* reward to one compelled to testify, does not arise under these facts.

6 That this was the meaning intended by Congress is also supported by the following statement of Rep. Berman: "A person is an original source if he had some of the information related to the claim . . . in advance of the false claims being publicly disclosed." 132 Cong. Rec. H29322 (Oct. 7, 1986).

ond Circuit decision, however, defeats Congress' intent and creates the absurd result that the plaintiff in *Dean* could *still* be barred from bringing a FCA action. The Second Circuit ruled that knowledge is direct and independent only when the information the plaintiff possesses is different from that publicly disclosed, *and* when the information upon which suit is based consists of information for which the plaintiff is the direct source, that is the plaintiff must have been directly involved in the fraud, have seen the fraud with his or her own eyes, or have authored the damaging documents. The court found that Kreindler was not an original source, because the information upon which Kreindler based its claim consisted of the same documents which were later disclosed in the *Bryant* case and because "UTC and its employees were the original sources" of that information.

Under this reading of the statute, the State of Wisconsin in *Dean* still would not qualify as an original source. Wisconsin's information was the very same information later disclosed to the Government and it was based on investigations of physicians' billing practices in Medicaid cases. The State of Wisconsin was not the original source of the physicians' records and billing statements which it obviously had to review to find fraud. Nor was Wisconsin directly involved in the fraud. It had no first-hand knowledge of the fraud.

It is simply not possible that Congress meant the requirement of "direct and independent" knowledge to bar a plaintiff like the State of Wisconsin in *Dean*, or Petitioner in this case, when the plaintiff has directly investigated the fraud and received information supporting the occurrence of fraud prior to and independently of any public disclosure. *See, also, Prudential*, 944 F.2d at 1173-74 (dissenting opinion rejects majority's reading of "direct and independent" as barring suits based on information obtained by the plaintiff through an intermediary or through a defendant's business records and would hold that direct and independent in the original source definition "refers

to whether the knowledge was obtained independently of the public disclosure").

Much fraud is discovered when independently based strangers to the fraud, e.g. certified public accountants, private investigators, attorneys, an ombudsman agency, watch-dog groups, etc., discover fraud as a result of a direct investigation of a contractor's activities and documents. These people are the original sources Congress meant to protect. These are the private attorney generals who assist the Government in protecting the public treasury. The Second Circuit decision adds a jurisdictional bar Congress never meant to exist.

The requirement for "original source" which the Second Circuit has added to the statute—that plaintiff must also directly or indirectly be a source to the entity that publicly disclosed the allegations—produces absurd and perverse results in this case and is contrary to Congressional intent.

Commenting on the Second Circuit's adoption of this element in *Dick*, the dissent in *Prudential* observed that among the many problems with the *Dick* holding was that "[i]t also raises the specter of 'preemptive' public disclosures by potential defendants fearing imminent *qui tam* suits." 944 F.2d at 1175.

This is exactly what the Second Circuit has permitted. By holding that UTC made public disclosures in the *Bryant* litigation and that Kreindler was not an original source to UTC as the entity making the public disclosure, the Second Circuit has permitted a defendant to preempt a plaintiff's FCA suit merely by filing in court materials and information which would never have been produced but for plaintiff's investigation of the defendant, plaintiff's discovery demands and the Federal Rule of Civil Procedure requiring that parties disclose discoverable material.

The result is particularly absurd in this case where the parties had agreed to maintain confidentiality of the information to protect what UTC claimed were its trade secrets. To allow a

defendant unilaterally to preempt a FCA suit by breaching its own requirement of confidentiality and filing discovery materials *previously provided to plaintiff at plaintiff's request* is a perverse result which could not have been intended by Congress. The ultimate absurdity of the Second Circuit decision is that had UTC not filed the discovery materials with the court, there would have been no "public disclosure" and *anyone* could have brought suit without being an original source. It is not possible that Congress could have intended this result. The decision below violates this Court's admonition to avoid absurd results when alternative interpretations consistent with the legislative purpose are available. *Griffin*, 458 U.S. at 575.[7]

The decision below, and the decisions of other circuit courts, have completely defeated Congress' efforts to strengthen the FCA and expand private citizen enforcement in the fight to curb fraud against the Government. In supporting the 1986 amendments, Representative Badell said the following:

> This section [*qui tam* provision] goes a long way toward restoring teeth to a law that was basically defanged in 1943 and rendered useless. I believe it is good policy to encourage citizens to help ensure that their tax dollars are spent well and to pressure the Government to follow through on cases raised by those citizens.

132 Cong. Rec. H22340 (Sept. 9, 1986).

All that Congress meant to bar was the true parasitic suit brought by a plaintiff who merely republishes public allega-

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7 The following statement of Rep. Berman is directly contrary to the conclusion the Second Circuit reached:

> The only exception to this minimum 15% recovery is the case where the information has already been disclosed and the person qualifies as an "original source" *but where the essential elements of the case were provided to the government or news media by someone other than the qui tam plaintiff*. In that case, the court may award up to 10% of the total recovery to the *qui tam* plaintiff.

132 Cong. Rec. H29322 (Oct. 7, 1986).

tions made in a Governmental disclosure without ever having been directly involved in the investigation, and who never would have known of the information upon which the allegations are based without the public disclosure.

Yet, what the Second Circuit has barred is a suit by a plaintiff who directly investigated and uncovered the fraud, merely because the defendant subsequently filed discovery materials requested by plaintiff in the very civil suit in which plaintiff discovered the fraud. The decision below permits the very Government contractor being investigated to preempt unilaterally a False Claims Act suit.

The FCA has been defanged again and petitioner respectfully requests that this Court grant this petition for certiorari to restore teeth to the FCA *qui tam* provisions.

CONCLUSION

Petitioner respectfully requests that this Court grant certiorari to review the opinion below.

Dated: April 22, 1993

Respectfully submitted,

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UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

Nos. 1363, 1756—August Term 1991

(Argued: May 13, 1992 Decided: January 22, 1993)

Docket Nos. 91-9288, 91-9380

UNITED STATES OF AMERICA, ex rel.
KREINDLER & KREINDLER,

Plaintiff-Appellant,
Cross-Appellee,

—v.—

UNITED TECHNOLOGIES CORPORATION,

Defendant-Appellee,
Cross-Appellant.

Before:

CARDAMONE, PIERCE, and MAHONEY,
Circuit Judges.

Plaintiff-appellant, cross-appellee Kreindler & Kreindler, the relator in this *qui tam* action filed on behalf

of the United States under the False Claims Act, 31 U.S.C. § 3729 (1988) *et seq.*, appeals from a summary judgment of the United States District Court for the Northern District of New York, Neil P. McCurn, *Chief Judge*, entered November 14, 1991 that dismissed Kreindler & Kreindler's complaint for failure to comply with the applicable statute of limitations. Defendant-appellee, cross-appellant United Technologies Corp. cross-appeals, contending that Kreindler and Kreindler lacked standing to bring this action, and that the district court lacked subject matter jurisdiction over it.

We affirm on the basis of an absence of subject matter jurisdiction.

STEVEN R. POUNIAN, New York, New York (Milton G. Sincoff, Blanca I. Rodriguez, David L. Fiol, Kreindler & Kreindler, New York, New York, of counsel), *for Plaintiff-Appellant, Cross-Appellee.*

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Stuart M. Gerson, Assistant Attorney General of the United States, Washington, D.C., Frederick J. Scullin, Jr., United States Attorney for the Northern District of New York, Syracuse, New York, Douglas N. Letter, Matthew M. Collette,

Attorneys, Appellate Staff Civil Division, Department of Justice, Washington, D.C., *for Amicus Curiae United States*.

Michael Davidson, Senate Legal Counsel, Ken U. Benjamin, Jr., Deputy Senate Legal Counsel, Morgan J. Frankel, Claire M. Sylvia, Assistant Senate Legal Counsel, Washington, D.C., *for Amicus Curiae United States Senate*.

John R. Phillips, Hall & Phillips, Los Angeles, California, Evan Caminker, U.C.L.A. School of Law, Los Angeles, California, *for Amicus Curiae Taxpayers Against Fraud*.

Clarence T. Kipps, Jr., Emmett B. Lewis, Mary Lou Soller, James R. Lovelace, Miller & Chevalier, Washington, D.C., Daniel J. Popeo, John C. Scully, Washington Legal Foundation Washington, D.C., *for Amicus Curiae Washington Legal Foundation*.

MAHONEY, *Circuit Judge*:

Plaintiff-appellant, cross-appellee Kreindler & Kreindler ("Kreindler"), the relator in this *qui tam* action filed on behalf of the United States under the False Claims Act, 31 U.S.C. § 3729 (1988) *et seq.* (the "FCA"), appeals from a summary judgment of the United States District Court for the Northern District of New York, Neil P. McCurn, *Chief Judge*, entered November 14, 1991 that dismissed Kreindler's complaint for failure to comply

with the applicable statute of limitations. The underlying memorandum-decision and order is reported as *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 777 F. Supp. 195 (N.D.N.Y. 1991).

Defendant-appellee, cross-appellant United Technologies Corp. ("UTC") cross-appeals from the district court's determination that Kreindler had standing to bring this action. UTC also contends on cross-appeal that the district court lacked subject matter jurisdiction over this suit, a contention raised below but not addressed by the district court.

We affirm on the basis of an absence of subject matter jurisdiction, viewing the suit as "based upon the public disclosure of allegations or transactions in a . . . civil . . . hearing" within the meaning of 31 U.S.C. § 3730(e)(4)(A) (1988), and concluding that Kreindler is not an "original source of the information" underlying this action within the meaning of § 3730(e)(4)(A) and (B).

Background

Kreindler previously represented Audrey L. Bryant, widow of United States Army warrant officer Charles Bryant, in a wrongful death action, *Bryant v. UTC*, 83 Civ. 992 (N.D.N.Y.), brought against UTC as a result of Charles Bryant's death in the 1982 crash of a UH-60A ("Black Hawk") helicopter manufactured by UTC. In connection with the discovery in that case, Kreindler entered into a stipulation and protective order (the "Stipulation") which stated that all UTC documents provided in discovery were "confidential and proprietary information which shall be used by plaintiff solely for the purposes of [the *Bryant*] action," and were to be immediately returned

to UTC or destroyed upon the final termination of that action. The *Bryant* action was settled in 1987 prior to trial. In the settlement agreement, Kreindler agreed to return all discovery documents and to honor the terms of the Stipulation. The agreement stated further that it was "binding upon Mrs. Bryant and [UTC] and their respective . . . attorneys." The agreement was signed by Mrs. Bryant, an attorney for UTC, and an attorney from Kreindler.

Army design specifications for the Black Hawk required that the helicopter be capable of being transported aboard military cargo aircraft. To accomplish this, the main rotor blades had to be folded, and the blade folding and unfolding had to be done rapidly and without maintenance technicians. Because folding the blades without disconnecting the control rods attached to them would transmit unacceptable pressure to the control assembly of the helicopter, UTC incorporated blade fold pins into its prototype helicopter design. The pins were inserted into holes in the helicopter's internal control mechanisms during blade folding. The function of these pins was to withstand and sustain the physical loads generated by folding the main rotor blades for transportation without disconnecting the attached control rods, preventing these physical loads from damaging sensitive flight control system components. The applicable contract did not specifically require blade fold pins, but did require blade folding capability.

Under Department of Defense regulation DOD-STD-480A (Apr. 12, 1978), UTC was required to seek approval from the assigned Army contracting officer for changes and waivers impacting upon safety and performance. Engineering changes to the Black Hawk design were classified as either Class I, those affecting "contractually

specified form, fit or function," or Class II, minor changes not having such an effect, such as alterations in documentation or hardware. UTC was contractually required to submit Class I change requests to the contracting officer at the Army Aviation Systems Command ("AVSCOM") in St. Louis, Missouri.

In late 1977 or early 1978, UTC discovered that certain engineering changes prevented the use of blade fold pins because the prefabricated holes into which the pins were to be inserted did not line up properly. According to Kreindler, UTC unilaterally and secretly revised its design to eliminate the pins rather than refabricate the components or submit design changes to the government for approval. In addition, UTC allegedly did not propose any substitute design for protecting the flight control system from pressure generated by folding the rotor blades. UTC contends that it abandoned the blade fold pin concept not only because of the alignment problems, but also because the final design of the helicopter made it too tall to fit into several cargo transport aircraft without disconnecting the pitch control rods connecting the blades to the control mechanisms. UTC claims that the disconnection alleviated the blade fold loads and made the blade fold pins unnecessary. UTC also maintains that the change was made with the full knowledge of the responsible Army officials.

The first Black Hawk helicopters were delivered to the Army in the summer of 1979. According to UTC, during training exercises in November 1979, UTC and the Army discovered that folding the rotor blades without disconnecting the pitch control rods exerted excess pressure that could crack ball bearings manufactured by the Fafnir Corporation ("Fafnir bearings") that were utilized in the flight

control system.[1] In November 1979, UTC changed the procedure by which rotor blades could be folded, requiring the pitch control rods to be disconnected before folding "to prevent loading the control system." In December 1979, the Commander of AVSCOM circulated a memorandum to all Army field units using the Black Hawk which advised that folding the rotor blades without disconnecting the pitch control rods could damage the Fafnir bearings, and ordered the Army units to inspect all affected Black Hawks and replace any damaged bearings.

On November 6, 1979, UTC submitted an engineering change notice that called for the replacement of the Fafnir bearings in all newly produced Black Hawks with solid rollers that could withstand greater pressure. Kreindler claims that when UTC switched to solid rollers, it concealed the fact that the change was necessitated because the blade fold loads resulting from the lack of blade fold pins tended to crack the Fafnir bearings. According to Kreindler, UTC falsely categorized the change notice as a Class II change rather than a Class I change in order to avoid retrofitting existing helicopters. UTC contends that the change notice was prompted by the warnings put out by Fafnir in its 1979 catalogue. *See supra* note 1. According to UTC, it did not become aware of the relationship

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1 In its complaint, Kreindler alleged that UTC discovered the problems with these bearings after an investigation of a May 1978 crash of one of its prototype helicopters. Kreindler also alleged that the Fafnir Corporation, manufacturer of the bearings, had previously issued express warnings in its technical catalogues against their use in any application during which they were subjected to a concentration of stress. UTC contends that the warnings did not appear until the 1979 Fafnir catalogue, and that they prompted UTC to submit an engineering change notice on November 6, 1979 that called for replacement of the Fafnir bearings with solid metal rollers. The engineering change notice states that "Fafnir's latest catalog discourages the use of this bearing because hardened outer race is susceptible to cracks."

between failure to disconnect the pitch control rods and the cracked bearings until November 15, 1979, after it had submitted the change notice.

The first 115 Black Hawks delivered to the Army, for which payment was made in March 1981, contained the Fafnir bearings which could not withstand blade folding pressures without disconnection of the pitch control rods. These helicopters were eventually retrofitted with solid metal rollers in 1983, after the fatal accident that led to the *Bryant* litigation. Although the related change notice specified that safety and standards were affected, UTC classified it as a Class II change.

Kreindler filed this action on December 30, 1987, contending that UTC knowingly violated its government contract and presented false or fraudulent claims for payment of over 700 Black Hawk helicopters delivered to the United States Army without blade fold pins, a contractually required and critical safety and performance feature. Kreindler asserted that this constituted a fraud on the government under the FCA, which imposes liability upon any person who

> knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval.

31 U.S.C. § 3729(a)(1) (1988). "Knowingly" is defined to mean that

> a person, with respect to information—
>
> (1) has actual knowledge of the information;
>
> (2) acts in deliberate ignorance of the truth or falsity of the information; or

(3) acts in reckless disregard of the truth or falsity of the information,

and no proof of specific intent to defraud is required.

31 U.S.C. § 3729(b) (1988).

Kreindler filed this action under seal, as required by 31 U.S.C. § 3730(b)(2) (1988), and forwarded the complaint to the United States Department of Justice, which had the option, under 31 U.S.C. § 3730(b)(4)(A) (1988), of conducting the action. After investigation, the United States notified Kreindler and the district court, pursuant to 31 U.S.C. § 3730(b)(4)(B) (1988), that it declined to pursue the action. Kreindler then served the complaint on UTC.

UTC filed motions pursuant to Fed. R. Civ. P. 12(b)(1) and 56 which asserted that: (1) the FCA's *qui tam* provisions allowing private citizens who have not suffered actual or threatened injury to sue on behalf of the government are unconstitutional, and Kreindler thus did not have standing to sue; (2) the court lacked subject matter jurisdiction in view of § 3730(e)(4) because the suit was based upon the public disclosure of the underlying allegations in the *Bryant* action and Kreindler was not an "original source of the information" upon which the action was based within the meaning of that provision; and (3) the claim was barred by the applicable statute of limitations.[2]

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2 The applicable limitations period is stated in 31 U.S.C. § 3731(b) (1988), which provides:

A civil action under section 3730 may not be brought—

(1) more than 6 years after the date on which the violation of section 3729 is committed, or

(2) more than 3 years after the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act

The district court denied UTC's motion to dismiss on standing grounds, concluding that the government's alleged injury as a result of UTC's conduct provided a valid basis for Congress to confer standing upon Kreindler to bring the action. 777 F. Supp. at 199-200. The court determined, however, that the action was barred by the pertinent statute of limitations, *id.* at 200-05, and accordingly declined to address the issue of subject matter jurisdiction posed by § 3730(e)(4). 777 F. Supp. at 205.

Kreindler appeals from that determination. UTC cross-appeals from those portions of the district court's decision which (1) held that Kreindler had standing, and (2) declined to dismiss the case for lack of subject matter jurisdiction pursuant to § 3730(e)(4).

Discussion

Under the FCA, individuals are authorized to "bring a civil action for a violation of [the Act] for the [complaining] person and for the United States Government." 31 U.S.C. § 3730(b)(1) (1988). The action is brought in the name of the government, *id.*, and the government may either intervene and prosecute the action, 31 U.S.C. § 3730(b)(2) (1988), or allow the original plaintiff—the *qui tam* relator—to proceed with the suit under 31 U.S.C. § 3730(b)(4)(B) (1988).

Whether or not the government joins in the action, the relator is entitled to a portion of the proceeds if the prosecution is successful. If the government intervenes in the

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in the circumstances, but in no event more than 10 years after the date on which the violation is committed,

whichever occurs last.

suit, the relator receives no less than fifteen and no more than twenty-five percent of the ultimate recovery. 31 U.S.C. § 3730(d)(1) (1988).[3] If the government does not join the suit, the relator receives from twenty-five to thirty percent of the recovery. 31 U.S.C. § 3730(d)(2) (1988).

We address on this appeal (1) UTC's claim that the *qui tam* provisions of the FCA violate Article III of the Constitution, and thus did not validly vest Kreindler with standing to bring this action; (2) Kreindler's contention that the district court erred in its statute of limitations ruling; and (3) UTC's argument that subject matter jurisdiction was not proper under § 3730(e)(4)(A).

A. *Standing*.

UTC argues that the FCA violates Article III of the Constitution by granting standing to private individuals to sue on the government's behalf when they have not personally suffered actual or threatened injury. The district court relied, 777 F. Supp. at 199, upon three recent cases upholding *qui tam* plaintiff standing: *United States ex rel. Truong v. Northrop Corp.*, 728 F. Supp. 615 (C.D. Cal. 1989); *United States ex rel. Newsham v. Lockheed Missiles & Space Co.*, 722 F. Supp. 607 (N.D. Cal. 1989); and *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F. Supp. 1084 (C.D. Cal. 1989).

Article III, section 2 of the Constitution confines federal court jurisdiction to the adjudication of "[c]ases" and "[c]ontroversies" in which the plaintiff has standing to maintain the suit. *Warth v. Seldin*, 422 U.S. 490, 498

3 Section 3730(d)(1) also provides, however, that in a government-adopted suit based "primarily" upon a public disclosure of the type described in § 3730(e)(4)(A), any award to the *qui tam* relator may not exceed ten percent of the proceeds of the action.

(1975). The constitutional doctrine of standing requires the plaintiff to show actual or threatened injury resulting from defendant's conduct that is redressible by a court. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99-100 (1979).

Congress, however, may create a legal interest and confer standing to assert it. "The actual or threatened injury required by Art. III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.' " *Warth*, 422 U.S. at 500 (quoting *Linda R. S. v. Richard D.*, 410 U.S. 614, 617 n.3 (1973)); *see also Trafficante v. Metropolitan Life Ins. Co.*, 409 U.S. 205, 212 (1972) (White, J., concurring); *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). In such a case, the prudential, judicially-created limitations on standing—such as individualized or particularized injury to the plaintiff—are not required, although the plaintiff must still allege some injury. "Congress may grant an express right of action to persons who otherwise would be barred by prudential standing rules." *Warth*, 422 U.S. at 501; *see also Gladstone*, 441 U.S. at 103 n.9. When Congress has extended standing under a statute to the limits of Article III, "the courts accordingly lack the authority to create prudential barriers to standing in suits brought under that [statute]." *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982) (citing *Gladstone*, 441 U.S. at 103 n.9, 109.

Nevertheless, some injury-in-fact must be shown to satisfy constitutional requirements, for Congress cannot waive the constitutional minimum of injury-in-fact. In a *qui tam* action, the plaintiff sues on behalf of and in the name of the government and invokes the standing of the government resulting from the fraud injury. *See United States ex rel. Milam v. University of Texas M.D. Anderson Cancer Ctr.*, 961 F.2d 46, 49 (4th Cir. 1992) ("The gov-

ernment, and not the relator, must have suffered the 'injury in fact' required for Article III standing."). "Where there is evidence of palpable injury to the entity on whose behalf and in whose name the suit is brought, it is superfluous to require that the relator be individually aggrieved." *Truong*, 728 F. Supp. at 619 (footnote omitted); *see also Stillwell*, 714 F. Supp. at 1098 ("There is no constitutional prohibition to the relator's suing, under a statutory grant of standing, on the injury to the United States."); 13A Charles A. Wright *et al.*, *Federal Practice and Procedure* § 3531.13, at 76 (1984) ("if Congress wishes, indeed, it can enact a qui tam statute to enable a private party to invoke the standing of the government to collect a civil penalty"). Thus, the government's alleged losses from UTC's fraud confer standing on Kreindler.

The government remains the real party in interest, however, in the FCA suit. As we have previously stated, "although *qui tam* actions allow individual citizens to initiate enforcement against wrongdoers who cause injury to the public at large, the Government remains the real party in interest in any such action." *Minotti v. Lensink*, 895 F.2d 100, 104 (2d Cir. 1990); *see also Milam*, 961 F.2d at 49 ("We could not lightly conclude that the party upon whose standing the justiciability of the case depends is not the real party in interest.")

The *qui tam* plaintiff has the requisite personal stake in the outcome of the case to assure "that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends." *Baker v. Carr*, 369 U.S. 186, 204 (1962). Because the *qui tam* relator: (1) funds the prosecution of the FCA suit, (2) will receive a private share in the government's recovery only upon prevailing, and (3) may be liable for costs if the suit is frivolous, the relator's personal stake in the case is suf-

ficiently ensured. *See United States ex rel. Givler v. Smith*, 775 F. Supp. 172, 181 (E.D. Pa. 1991); *Truong*, 728 F. Supp. at 619 n.7; *Stillwell*, 714 F. Supp. at 1098-99.

UTC argues that such an interpretation permits Congress to circumvent Article III standing requirements. Citing *Valley Forge Christian College v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464 (1982), UTC argues that Congress cannot authorize suit by a relator who has not suffered an injury distinct from the harm suffered by all citizens when the government is defrauded. In *Valley Forge*, however, plaintiffs claimed standing only as taxpayers or citizens. 454 U.S. at 469-70. Here, by contrast, the *qui tam* relator stands in the shoes of the government, which is the real party in interest.

The traditional Article III separation-of-powers concerns, as enunciated in *Valley Forge*, 454 U.S. at 472-74, are not violated by allowing *qui tam* suits under the FCA. Such suits do not constitute an intrusion into areas committed to other governmental branches, for the courts are specifically engaged in the implementation of legislative policy. Thus, in adjudicating FCA cases, courts further the Congressional purpose of augmenting executive enforcement of fraud cases. *See Public Interest Bounty Hunters v. Board of Governors of the Fed. Reserve Sys.*, 548 F. Supp. 157, 161 (N.D. Ga. 1982) ("*Qui tam* plaintiffs therefore stand in the position of 'private attorneys general' whom Congress has 'deputized' to enforce federal laws."); *see also Priebe & Sons, Inc. v. United States*, 332 U.S. 407, 418 (1947) (Frankfurter, J., dissenting) (in *qui tam* actions, "society makes individuals the representatives of the public for the purpose of enforcing a policy explicitly formulated by legislation"); *Spann v. Colonial*

Village, Inc., 899 F.2d 24, 30 (D.C. Cir. 1990) (plaintiff enforcing Fair Housing Act of 1968 acts as private attorney general vindicating Congressional policy), *cert. denied*, 111 S. Ct. 508, 509 (1990), 751 (1991).

Accordingly, the Supreme Court has stated that:

> Qui tam suits have been frequently permitted by legislative action, and have not been without defense by the courts. . . .
>
> Congress has power to choose this method to protect the government from burdens fraudulently imposed upon it; to nullify the . . . statute because of dislike of the independent informer sections would be to exercise a veto power which is not ours. Sound rules of statutory interpretation exist to discover and not to direct the Congressional will.

United States ex rel. Marcus v. Hess, 317 U.S. 537, 541-42 (1943) (footnotes omitted). More recently, in *Lujan v. Defenders of Wildlife*, 112 S. Ct. 2130 (1992), the Court, although denying citizen standing under the Endangered Species Act of 1973, 16 U.S.C. § 1531 (1988) *et seq.*, distinguished "the unusual case in which Congress has created a concrete private interest in the outcome of a suit against a private party for the government's benefit, by providing a cash bounty for the victorious plaintiff." 112 S. Ct. at 2143. *See also United States ex rel. Woodard v. Country View Care Ctr., Inc.*, 797 F.2d 888, 893 (10th Cir. 1986) ("The [FCA] statute of course eliminated any standing problem."); *United States ex rel. Weinberger v. Equifax, Inc.*, 557 F.2d 456, 460 (5th Cir. 1977) (same), *cert. denied*, 434 U.S. 1035 (1978). A concrete case or controversy exists, and the asserted harm is redressible by civil penalties and damages. 31 U.S.C. § 3729(a) (1988).

Finally, the FCA *qui tam* provisions do not usurp the executive branch's litigating function because the statute gives the executive branch substantial control over the litigation. *See Truong*, 728 F. Supp. at 621-22; *Stillwell*, 714 F. Supp. at 1086-93. This multi-branch approach is consistent with the fundamental structure and concepts of the Constitution. "While the Constitution diffuses power the better to secure liberty, it also contemplates that practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity." *Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579, 635 (1952) (Jackson, J., concurring); *see also id.* at 610 (Frankfurter, J., concurring) ("[T]he content of the three authorities of government is not to be derived from an abstract analysis. The areas are partly interacting, not wholly disjointed.").

B. *Statute of Limitations.*

As indicated *supra*, the district court dismissed this action on the basis of the applicable statute of limitations, § 3731(b) (set forth *supra* note 2), and therefore did not address the issue of subject matter jurisdiction posed by § 3730(e)(4). This procedure was inappropriate. As we stated in *Rhulen Agency, Inc. v. Alabama Ins. Guar. Ass'n*, 896 F.2d 674 (2d Cir. 1990):

> Where, as here, the defendant moves for dismissal under Rule 12(b)(1), Fed. R. Civ. P., as well as on other grounds, "the court should consider the Rule 12(b)(1) challenge first since if it must dismiss the complaint for lack of subject matter jurisdiction, the accompanying defenses and objections become moot and do not need to be determined." 5 C. Wright and A. Miller, *Federal Practice and Procedure*, § 1350, p. 548 (1969); cf., *Bell v. Hood*, 327 U.S. 678, 682,

> 66 S. Ct. 773, 776, 90 L.Ed. 939 (1946) (motion to dismiss for failure to state a claim may be decided only after finding subject matter jurisdiction).

Id. at 678; *see also Jones v. State of Ga.*, 725 F.2d 622, 623 (11th Cir.) ("exceptions" to this "generally preferable approach" exist when plaintiff's claim has no plausible foundation or is clearly foreclosed by Supreme Court precedent), *cert. denied*, 469 U.S. 979 (1984); *United States ex. rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Ga., Inc. ("Blue Cross")*, 755 F. Supp. 1040, 1047 (S. D. Ga.) (citing *Jones*, court in *qui tam* action considered first whether § 3730(e)(4) precluded subject matter jurisdiction), *dismissed on rehearing*, 755 F. Supp. 1055 (S. D. Ga. 1990).

Before we move on to the dispositive issue of subject matter jurisdiction under § 3730(e)(4), however, we will briefly state our disagreement with two aspects of the district court's discussion of the statute of limitations issue, since that discussion occurs in a published opinion that might be regarded, absent any correction or clarification by this court, as precedential in this circuit.

The three-year limitations period stated in § 3731(b)(2) commences on "the date when facts material to the right of action are known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances." *See supra* note 2. In considering this aspect of the limitations issue, the district court stated:

> The intentional concealment from the Army of the abandonment of the blade fold pin concept is the basis of relator's claim. . . . However, none of the helicopters delivered to the Army had blade fold pins, a fact that was obvious to Army officials in

> 1979. There is no question of fact regarding the Black Hawk Project Manager's Office's knowledge of the alleged defect. Accordingly, the relator has no claim under the False Claims Act, since the government "knew of those very facts or characteristics" which allegedly made defendant's claims false.

777 F. Supp. at 204 (quoting *Boisjoly v. Morton Thiokol, Inc.*, 706 F. Supp. 795, 810 (D. Utah 1988)).

Boisjoly is not addressed to the "known or reasonably should have been known" language of § 3731(b)(2), but rather to the threshold requirement of § 3729(a)(1) that a defendant "knowingly" present a false claim to the United States government in order for FCA liability to attach. We disagree with *Boisjoly*'s interpretation of § 3729(a)(1), and concur in the contrary view expressed by the Ninth Circuit in *United States ex. rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991). That case expressly rejected the contention that government knowledge of the falsity of a claim automatically bars an FCA action, stating: "The requisite intent is the knowing presentation of what is known to be false. That the relevant government officials know of the falsity is not in itself a defense." *Id.* at 1421 (citing *United States v. Ehrlich*, 643 F.2d 634, 638-39 (9th Cir.), *cert. denied*, 454 U.S. 940 (1981)). The court added that "*Boisjoly* may be defensible on its facts; its dicta are an unreliable guide." *Id.*

It is unclear whether the *Boisjoly* statement at issue here is a dictum, especially since the *Boisjoly* court stated it as a holding. *See* 706 F. Supp. at 810. In any event, we agree that it is an unreliable guide. Although the ruling in favor of the defendant was warranted on the facts of that case, we agree with *Hagood* that the statutory basis for an FCA claim is the defendant's knowledge of the falsity of

its claim, *see* 31 U.S. § 3729(a) & (b) (1988), which is not automatically exonerated by any overlapping knowledge by government officials.

As the government concedes in an amicus brief addressed to this issue, on the other hand, government knowledge may be relevant to a defendant's liability:

> The fact that a contractor has fully disclosed all information to the government may show that the contractor has not "knowingly" submitted a false claim, that is, that it did not act with "deliberate ignorance" or "reckless disregard for the truth." See 31 U.S.C. § 3729(b). In some cases, the fact that government officials knew of the contractor's actions may show that the contract has been modified or that its intent has been clarified, and therefore that the claim submitted by the contractor was not "false."

Amicus curiae brief of the United States at 16.

The district court in this case also stated that it "was not persuaded by [Kreindler's] 'continuing fraud' theory, i.e., that a fraudulent claim was made with the delivery of each helicopter, since the alleged defect in each helicopter was known to the government in 1979." 777 F. Supp. at 205. This comment occurred in the aftermath of the district court's adoption of *Boisjoly*, a case addressed to the issue of liability rather than the statute of limitations. In any event, the quoted statement does not reflect the law generally applicable with respect to the FCA statute of limitations.

Specifically, the number of assertable FCA claims is not measured by the number of contracts, but rather by the number of fraudulent acts committed by the defendant. *See United States v. Bornstein*, 423 U.S. 303, 311 (1976);

see also Ehrlich, 643 F.2d at 638 ("if a person knowingly causes a specific number of false claims to be filed, he is liable for an equal number of forfeitures"); *United States v. Woodbury*, 359 F.2d 370, 377-78 (9th Cir. 1966) (same). Further, as to each such claim, the six-year limitations period of § 3731(b)(1) "begins to run on the date the claim is made, or, if the claim is paid, on the date of payment." *Blusal Meats, Inc. v. United States*, 638 F. Supp. 824, 829 (S.D.N.Y. 1986) (collecting cases), *aff'd*, 817 F.2d 1007 (2d Cir. 1987).

We turn to the issue of subject matter jurisdiction that we deem dispositive of this appeal.

C. *Subject Matter Jurisdiction under 31 U.S.C. § 3730(e)(4)(1988).*

Section 3730(e)(4) provides in pertinent part:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing . . . unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

As the language of this statute makes clear, "[t]he satisfaction of . . . § 3730(e)(4) is . . . an issue of subject

matter jurisdiction." *United States ex rel. Precision Co. v. Koch Indus., Inc.*, 971 F.2d 548, 551 (10th Cir. 1992) (collecting cases), *petition for cert. filed*, 61 U.S.L.W. 3437 (U.S. Nov. 30, 1992) (No. 92-927). Section 3730(e)(4) is intended to bar "parasitic lawsuits" based upon publicly disclosed information in which would-be relators "seek remuneration although they contributed nothing to the exposure of the fraud." *United States ex rel. John Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992); *see also United States v. CAC-Ramsay, Inc.*, 744 F. Supp. 1158, 1159 (S.D. Fla. 1990) ("it will usually serve no purpose to reward a relator for bringing a *qui tam* action if the incident of fraud is already a matter of public knowledge by virtue of 'public disclosure' "), *aff'd mem.*, 963 F.2d 384 (11th Cir. 1992).

UTC contends that discovery material containing all of the information upon which Kreindler's claim is based was filed with the district court in the *Bryant* litigation. Although Kreindler was barred from disclosing that information by the Stipulation, the *Bryant* record was not sealed. Indeed, the district court denied a motion by UTC "for the sealing of all pleadings in this case containing copies of protected [UTC] documents." Thus, the information was publicly disclosed because it was available to anyone who wished to consult the court file.

As the Third Circuit stated in *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.* (*"Prudential"*), 944 F.2d 1149, 1155-56 (3d Cir. 1991), § 3730(e)(4) was "designed to preclude *qui tam* suits based on information that would have been equally available to strangers to the fraud transaction had they chosen to look for it as it was to the relator. Information gleaned in litigation and on file in the clerk's office falls

in this category."[4] *See John Doe*, 960 F.2d at 322 ("Potential accessibility by those not a party to the fraud was the touchstone of public disclosure [in *Prudential*.]"). *See also Wang v. FMC Corp.*, 975 F.2d 1412, 1416-17 (9th Cir. 1992) (information revealed through discovery in a civil litigation "publicly disclosed" for purposes of a subsequent *qui tam* action) (citing *Prudential*, 944 F.2d at 1157-60); *Precision Co.*, 971 F.2d at 553-54 (allegations in prior civil suit "publicly disclosed" within meaning of § 3730(e)(4)(A)); *United States ex rel. Houck v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504 (7th Cir. 1989) (same), *cert. denied*, 494 U.S. 1026 (1990). *But see Blue Cross*, 755 F. Supp. at 1048-50 (information revealed in civil litigation not disclosed "in a . . . civil . . . hearing" within meaning of § 3730(e)(4)(A)); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.* (*"Provident"*), 721 F. Supp. 1247, 1256-57 (S.D. Fla. 1989) (civil litigation probably not a § 3730(e)(4)(A) "hearing," but case decided on other grounds).

Kreindler argues that even if the discovery material was publicly disclosed, Kreindler did not obtain the pertinent

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4 *Kreindler* seeks to distinguish *Prudential* on the basis of a statement in *Prudential* that "we need not consider whether information subject to a protective order which is either advertently or inadvertently disclosed could be considered to be received pursuant to a 'public disclosure.' " 944 F.2d at 1158. As we have pointed out, however, the Stipulation in this case did not prohibit filings in court of, and thus public access to, discovery and other litigation documents. We express no view regarding the case of a protective order that effectively precludes public access to the § 3730(e)(4)(A) "allegations or transactions" underlying a *qui tam* action. Additionally, in view of our resolution of the statutory issue of subject matter jurisdiction, we express no view regarding UTC's contention that Kreindler's *qui tam* action should be barred because it constitutes a violation of the Stipulation's mandate that material disclosed to Kreindler by UTC in the *Bryant* action be used "solely for the purposes of" that case.

information "solely" from that material, but also through independent investigation. The phrase "solely," however, is not included in § 3730(e)(4)(A), which addresses actions "based upon" public disclosure of the underlying allegations or transactions. Further, *Precision Co.*, 971 F.2d at 552-53, explicitly repudiates the notion that § 3739(e)(4)(A) bars only actions based "solely" upon publicly disclosed information, concluding that the statute applies to a "*qui tam* action . . . based in any part upon publicly disclosed allegations or transactions." *Id.* at 553. In addition, *John Doe* states that "[p]ublic disclosure of the allegations divests district courts of jurisdiction over *qui tam* suits, regardless of where the relator obtained his information." 960 F.2d at 324; *see also United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990) ("if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred").

It follows that in order to avoid the statutory bar, Kreindler must satisfy the limited exception to that bar provided by § 3730(e)(4)(A) & (B) to an "original source of the information." As we stated in *Dick*, however:

> In assessing the pertinent language of the statute, we note that "original source" is expressly defined in § 3730(e)(4)(B). A straightforward reading of § 3730(e)(4)(B) indicates that to be an "original source" a *qui tam* plaintiff must (1) have direct and independent knowledge of the information on which the allegations are based, and (2) have voluntarily provided such information to the government prior to filing suit. A close textual analysis combined with a review of the legislative history convinces us that under § 3730(e)(4)(A) there is an additional require-

> ment that a *qui tam* plaintiff must meet in order to be considered an "original source," namely, a plaintiff also must have directly or indirectly been a source to the entity that publicly disclosed the allegations on which a suit is based.

912 F.2d at 16.

Kreindler does not meet these requirements. Although Kreindler conducted, as counsel, the litigation that resulted in public disclosure of information concerning Black Hawk helicopters upon which Kreindler relies to bring the *qui tam* action, UTC and its employees were the original sources of the information disclosed in that litigation. *See Prudential*, 944 F.2d at 1160 (memoranda produced in discovery constituted "public disclosure," counsel to whom memoranda produced not "original source"); *Houck*, 881 F.2d at 504-05 (relator who assisted claimants in prior litigation did not have "independent" knowledge of information ascertained via that activity, so not an "original source"); *cf. Provident*, 721 F. Supp. at 1257-58 (law firm/relator that derived primary information from independent investigation rather than discovery in prior civil litigation was "original source").

Kreindler had no significant direct knowledge regarding the Black Hawks independent of the disclosures made to Kreindler by UTC, and certainly was not a source of that information *to* UTC. The fact that Kreindler conducted some collateral research and investigations regarding the Black Hawk situation, as would be customary in such litigation, does not establish "direct and independent knowledge of the information on which the allegations are based" within the meaning of § 3730(e)(4)(B); UTC was clearly the source of the core information. Nor does the fact that Kreindler's background knowledge enabled it to

understand the significance of the information acquired in the *Bryant* action make its knowledge independent of the publicly disclosed information. If that "were enough to qualify the relator as an 'original source,' then a cryptographer who translated a ciphered document in a public court record would be an 'original source,' an unlikely interpretation of the phrase." *Prudential*, 944 F.2d at 1160.

In sum, because Kreindler's *qui tam* action is "based upon the public disclosure of allegations or transactions" in the *Bryant* action within the meaning of § 3730(e)(4)(A), and because Kriendler is not an "original source" of the pertinent information within the meaning of § 3730(e)(4)(A) and (B), there is no subject matter jurisdiction in this case.

Conclusion

The judgment of the district court dismissing the complaint is affirmed on the basis that § 3730(e)(4) precludes subject matter jurisdiction.

IN THE
UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF NEW YORK

No. 87-CV-1626

Nov. 14, 1991

UNITED STATES OF AMERICAN, ex rel.
KREINDLER & KREINDLER,

Plaintiff,

—v.—

UNITED TECHNOLOGIES CORPORATION,

Defendant.

MEMORANDUM-DECISION AND ORDER

MCCURN, *Chief Judge*:

I. *Introduction*

The plaintiff, Kreindler & Kreindler, known as the "relator" in this type of *qui tam* proceeding, is a law firm which has filed fraud claims against the defendant, United Technologies Corp. ("UTC"), pursuant to the provisions of the False Claims Act, particularly 31 U.S.C. §§ 3729 and 3730. The relator claims that defendant UTC concealed a design defect in the rotors of helicopters it sold to the U.S. Army. The defendant has filed four separate motions—two motions to dismiss and two motions for summary judgment. The defendant moves to dismiss on the grounds that the portions of the False Claims Act which permit relator to sue on behalf of the United States government are unconstitutional inasmuch as they violate the separation of powers doctrine and the Appointments Clause of the U.S. Constitution, and because relator does not have standing to bring the claims. Defendant also moves to dismiss for lack

of subject matter jurisdiction because the relator is not an "original source" of the information upon which its claims are based, as required by 31 U.S.C. § 3730(e)(4)(A). Defendant moves for summary judgment, contending that relator's claims are barred by the applicable statute of limitations, and that relator is prohibited from using most of the evidence on which it bases its claims by a settlement agreement and protective order involving the same two parties in a previous wrongful death action.

II. Background

The relator, Kreindler & Kreindler, represented Audrey Bryant, the wife of U.S. Army Warrant Officer Charles Edward Bryant, in a wrongful death action brought in this court as a result of Mr. Bryant's death on August 5, 1982, in the crash of an Army helicopter manufactured by the defendant UTC. That litigation was terminated by a settlement agreement entered into by Mrs. Bryant and Sikorsky Aircraft, a division of UTC, on July 21, 1987. The parties had also previously entered into a stipulation and protective order, dated November 21, 1984, which provided that "the documents, data, information and other materials provided by [UTC] in the defense of this action and/or pursuant to plaintiff's pretrial discovery requests . . . shall be used by plaintiff solely for the purposes of this action." The settlement agreement stated: "As a condition to this Agreement, Mrs. Bryant and her attorneys expressly agree to [return the documents and materials and] . . . to honor all other terms and conditions of the Stipulation and Protective Order." The settlement agreement stated further that it was "binding upon Mrs. Bryant and United Technologies Corporation and their respective . . . attorneys. . . ." The settlement agreement was signed by Mrs. Bryant, representatives from UTC, and Francis Fleming, an attorney for Kreindler & Kreindler.

As relator states in the complaint, its claims in the present action are based on information obtained from UTC in discovery in the previous action, *Bryant v. United Technologies*

Corp. Complaint, para. 2, 5. The relator claims that UTC was awarded a contract by the United States government to provide the Army with several hundred UH-60A "Black Hawk" helicopters. One of the features required by the contract was the ability to fold the rotor blades of the helicopters so they could be transported in Army transport planes. Relator claims that in late 1977 or early 1978, UTC discovered that its design to incorporate this feature, in which "blade fold pins" were to be inserted into the "flight control assembly system" to eliminate pressure on the flight control system, was defective in that the prefabricated holes into which the pins were to be inserted did not line up. This aspect of the design proposal has never been corrected by UTC, relator asserts, although approximately 690 Black Hawk helicopters have been delivered by UTC to the Army. Relator alleges that UTC secretly revised its design rather than refabricate the affected components so that the pins could be inserted. Relator alleges that UTC made its design change, which consisted of changing the type of bearing used in the flight control assembly system, without advising the United States that the change was being made or obtaining required approval for the change. Relator also claims that UTC failed to advise the United States that a hazard had been created by the abandonment of the blade fold pin design, and that UTC knew of the hazard. Relator claims that UTC changed the procedure by which rotor blades could be folded, calling for pitch control rods to be disconnected, although this change in procedure would make it impossible for the blade folding process to be completed in the time limits specified in the Army production contract. UTC later informed the Army of an alternative process which entailed inserting a block of wood into the rotor assembly to relieve pressure on the rotor system during the blade folding process. These failures to meet the required specifications and failure to inform the United States about the safety hazard constitute a fraud on the government, relator asserts. In addition, the relator claims, the design defect resulted in the crash of five Black Hawk helicopters between the years of 1982 and 1987.

III. Discussion

The relator brings this *qui tam*[1] action on behalf of the United States pursuant to provisions of the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*[2] The False Claims Act was originally enacted in 1863 during the Lincoln Administration, and has been amended twice, in 1943 and 1986. Under all versions of the Act, individuals have been authorized to "bring a civil action for a violation of [the Act] for the person and for the United States Government." 31 U.S.C. § 3730(b)(1).

Briefly, the statute as now amended specifies the following procedure with respect to *qui tam* actions: The relator must file his complaint *in camera* where it remains under seal for at least 60 days to allow the government sufficient time to decide whether to enter the action. 31 U.S.C. § 3730(b)(2). If the government decides not to joint the action—as it did in the instant case—the action will proceed in its behalf at the direction of the relator. 31 U.S.C. 3730(c)(3). The government may, however, intervene at a later date upon a showing of "good cause." 31 U.S.C. § 3730(c)(3).

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1 The connotation "*qui tam*" is derived from the Latin phrase "*qui tam pro domino rege quam pro se ipso in hac parte sequitur*," which means "who brings the action for the king as well as for himself."

2 Section 3729 provides, in pertinant part, that:

> [a]any person who . . . (1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim or payment for approval;
>
> (2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> (3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid . . .
>
> is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus three times the amount of damages which the Government sustains because of the act of that person. . . .

31 U.S.C. § 3729(a).

If the government does intervene, it assumes primary responsibility for the prosecution of the case, "and shall not be bound by an act of the person bringing the action." 31 U.S.C. § 3730 (c)(1). The relator remains as a party to the action, however, and his participation may be limited only by order of the court. 31 U.S.C. § 3730(c)(2)(C)-(D).

Whether or not the government joins the suit, the *qui tam* relator is entitled to a portion of the proceeds if the prosecution is successful. If the government participates, the relator will receive no less than 15 percent and no more than 25 percent of the recovery. 31 U.S.C. § 3730(d)(1). If the government does not join in the action, recovery is set at 25 percent to 30 percent. 31 U.S.C. § 3730(d)(2).

The question of the constitutionality of the *qui tam* provisions of the False Claims Act has been the subject of a number of recent cases in the federal courts, and of great interest to the defense contracting industry, the government, and the public. Several amicus curiae briefs were submitted to the court on the issue, and counsel representing the United States Senate and the House of Representatives presented oral argument to the court on the return date for these motions. Before reaching the question of the statute's constitutionality, however, the motions based on other grounds will be considered, since the court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available. Hagans v. Lavine, 415 U.S. 528, 547, 94 S.Ct. 1372, 1384, 39 L.Ed.2d 577 (1974); *United States v. Leon*, 766 F.2d 77, 78 (2d Cir.1985) ("a court should not reach constitutional issues when there are other, nonconstitutional grounds upon which it can resolve the case"). Of those, the jurisdictional issues—plaintiff's standing and the applicability of the statute of limitations—will be addressed first.

A. STANDING

The defendant contends that the relator does not have standing to bring this suit, since it has not suffered "some actual or threatened injury as a result of the putatively illegal conduct of the defendant." *Gladstone Realtors v. Bellwood*, 441 U.S. 91,

99, 99 S.Ct. 1601, 1608, 60 L.Ed.2d 66 (1979). Defendant also argues that Congress cannot eliminate the Constitution's standing requirement by creating a financial incentive for a plaintiff that is not the result of an injury to the plaintiff itself.

Defendant argues that the relator lacks standing because it has no " 'personal stake in the outcome of the controversy' . . . to ensure . . . an adversarial [proceeding] capable of judicial resolution." *Sierra Club v. Morton*, 405 U.S. 727, 732, 92 S.Ct. 1361, 1364, 31 L.Ed.2d 636 (1972) (quoting *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 703, 7 L.Ed.2d 663 (1962)). Of course, Article III of the Constitution limits federal court jurisdiction to the resolution of "cases" or "controversies," and federal courts thus lack the power to render advisory opinions, to resolve political questions, or to entertain friendly suits. *See Sierra Club*, 405 U.S. at 732 n.3, 92 S.Ct. at 1365 n. 3.

The standing of a *qui tam* plaintiff in a False Claims Act action has been upheld in three cases cited to the court by the plaintiff. *See United States ex rel. Truong v. Northrop Corp.*, 728 F.Supp. 615 (C.D.Cal.1989); *United States ex rel. Newsham v. Lockheed Missiles and Space Co.*, 722 F.Supp. 607 (N.D.Cal. 1989); *United States ex rel. Stillwell v. Hughes Helicopters, Inc.*, 714 F.Supp. 1084 (C.D.Cal.1989). As the court notes in *Stillwell*, Congress may create a legal interest and confer standing to assert that right. *Stillwell*, 714 F.Supp. at 1096 (citing *Trafficante v. Metropolitan Life Insurance Co.*, 409 U.S. 205, 208-09, 93 S.Ct. 364, 366-67, 34 L.Ed.2d 415 (1972)). If Congress does create statutory standing, the normal requirements of standing—particularly the requirement that the plaintiff's injury be individualized and particularized—are not considered by the reviewing court. *Stillwell*, 714 F.Supp. at 1096 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372, 102 S.Ct. 1114, 1120, 71 L.Ed.2d 214 (1982)). Nevertheless, "Congress may not confer standing on a plaintiff who cannot show the constitutional minimum of injury-in-fact." *Stillwell*, 714 F.Supp. at 1096 (citing *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 488 n. 24, 102 S.Ct. 752, 766 n. 24, 70 L.Ed.2d 700 (1982)).

With respect to the injury-in-fact requirement, the courts in *Truong*, *Newsham* and *Stillwell* note that the various *qui tam* statutes passed by Congress have survived constitutional challenges based on purported lack of standing. In addition, "[t]here is no constitutional prohibition to the relator's suing, under a statutory grant of standing, on the injury to the United States." *Stillwell*, 714 F.Supp. at 1098. *See also Kingsley Books*, Inc. v. Brown, 354 U.S. 436, 441, 77 S.Ct. 1325, 1327, 1 L.Ed.2d 1469 (1957); *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 541, 63 S.Ct. 379, 383, 87 L.Ed. 443 (1943); *see also* 13A C. Wright, A. Miller & E. Cooper, Federal Practice and Procedure § 3531.13 at 76 (1984) ("if Congress wishes, indeed it can enact a *qui tam* statute to enable a private party to invoke the standing of the government to collect a civil penalty"). The court in *Truong* found that, "[w]here there is evidence of palpable injury to the entity on whose behalf and in whose name the suit is brought, it is superfluous to require that the relator be individually aggrieved." *Truong*, 728 F.Supp. at 619. The *Truong*, *Newsham* and *Stillwell* courts thus held that Congress properly conferred standing on *qui tam relators* under the False Claims Act. *Truong*, 728 F.Supp. at 618-19; *Newsham*, 722 F.Supp. at 614-15; *Stillwell*, 714 F.Supp. at 1098-99. The court finds the reasoning in these cases persuasive.

Some injury-in-fact to the government must be present, however. *See Truong*, 728 F.Supp. at 618; *Stillwell*, 714 F.Supp. at 1098. Here, the relator alleges that the government has been damaged by defendant's fraud in concealing its unilateral design change in the blade fold system. The government has paid for hundreds of helicopters with this concealed design flaw, plaintiffs aver. This is sufficient to confer standing on the relator. The Court in *Stillwell* also recognized other possible bases for a relator's standing. First, the "statutory bounty" available under the False Claims Act creates a personal stake in the outcome on behalf of the relator, and makes him or her a real party in interest pursuant to Fed.R.Civ.P. 17. *Id.* at 1098-99. Second, since the relator often has access to the information forming the basis of his claim only through his employment

relationship, he or she faces the prospect of loss of employment and benefits if the fraud is disclosed. *Id.* at 1099. Finally, to the extent the relator is a knowing participant in the fraud and fails to act on it, he or she may be liable in a False Claims Act prosecution. *Id.* Although the second and third reasons are not applicable to the relator here, since it was not an employee of the defendant, the statutory bounty creates an additional basis for relator's standing.

B. STATUTE OF LIMITATIONS

Defendant moves for summary judgment on the ground that the statute of limitations has run on relator's claim. The applicable limitations period for a false claims action is six years from the date of the violation of the False Claims Act, or three years from the date that the government knew or should have known of the violation. The Act provides:

> A civil action under section 3730 may not be brought—
>
> (1) more than 6 years after the date on which the violation of section 3729 is committed, or
>
> (2) more than 3 years after the date when facts material to the right of action are known or reasonably known or reasonably should have been known by the official of the United States charged with responsibility to act in the circumstances, but in no event more than 10 years after the date on which the violation is committed, whichever occurs last.

31 U.S.C. § 3731(b) (1986).

The six-year limitations period begins to run "on the date the claim is made or, if the claim is paid, on the date of the payment." *Blusal Meats, Inc. v. United States*, 638 F.Supp. 824, 829 (S.D.N.Y.1986), *aff'd*, 817 F.2d 1007 (2d Cir. 1987). As the statute states, the three-year limitations period begins to run from the date "when facts material to the right of action are known or reasonably should have been known" by the government official responsible for such information.

UTC maintains that the relator's fraud claims can, at most, extend to the first 115 Black Hawk helicopters delivered by UTC, since those were the only aircraft delivered with the faulty Fafnir bearing design. UTC contends it ceased using the Fafnir bearing in 1980, and that in 1979 the Army was aware of this design problem and informed its personnel that they must disconnect the pitch control rods before folding the rotor blades. Thus, since 1979, UTC argues, the Army knew of the facts material to relator's claim, and there was no hidden defect. Consequently, the defendant contends, since the government was aware of the alleged defect in 1979, it has no claim under the False Claims Act, since an essential element is that the claim be false or fraudulent. *See Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp. 795, 808 (D.Utah 1988).

The relator apparently concedes in its responding memorandum that claims based on the first 115 helicopters are barred by the six-year statute of limitations, since the last payments on those aircraft were made in March 1981, and the complaint was filed December 30, 1987.

The relator maintains, however, that the six-year limitations period commenced upon payment for each helicopter delivered to the United States, since the fraud by defendant—concealing its unilateral abandonment of the blade fold pin design—continued unknown to the government until the commencement of this suit. Relator asserts that the government has continued to purchase Black Hawk helicopters even after the filing of the complaint in this action. Relator also seeks to toll the statute of limitations, asserting that the official with responsibility to act here did not have knowledge of the fraud. The relator contends that the defendant has failed to sustain its initial burden of showing the absence of material issues of fact as to which government official was responsible for the information in this case, when the government had knowledge of the facts constituting the alleged fraud, the nature of the fraudulent claim, and the date the defendant presented claims for payment with knowledge or reckless disregard of the facts constituting fraud. *See Celotex v. Catrett*, 477 U.S. 317, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986).

Relator also claims that it has not had, or was prevented from conducting, adequate discovery in the case so as to develop these factual issues. The granting of a motion for summary judgment assumes that the parties have had ample opportunity for discovery. *Anderson v. Liberty Lobby*, 477 U.S. 242, 250 n. 5, 106 S.Ct. 2505, 2511 n. 5, 91 L.Ed.2d 202 (1986). However, the nonmoving party need not be given the opportunity to complete discovery if it already has had adequate opportunity for discovery and has not taken advantage of it. *Trebor Sportswear Co. v. The Limited Stores, Inc.*, 865 F.2d 506 (2d Cir.1989).

In *Boisjoly v. Morton Thiokol, Inc.*, 706 F.Supp. 795 (D.Utah 1988), the court considered, among other causes of action, a *qui tam* claim under the False Claims Act brought by an employee of Morton Thiokol, Inc. ("Morton Thiokol"), the manufacturer of the seal blamed for the 1986 Space Shuttle Challenger explosion. The relator alleged that defects in the seals that could result in accidents were known to Morton Thiokol and to the government, and that during the period Morton Thiokol sold the seals to the National Aeronautics and Space Administration ("NASA"), Morton Thiokol "made false claims for payments knowing that the [seals] did not meet contract specifications." *Id.* at 809.

The court found that the allegations in relator's complaint that the government knew of the defects in the seals negated his False Claims Act claim. The court observed that other courts have disallowed False Claims Act claims where the government knew, or was in possession at the time of the claim, of the facts that make the claim false. *Id.* (citing *United States v. Fox Lake State Bank*, 366 F.2d 962, 965 (7th Cir.1966); *Woodbury v. United States*, 232 F.Supp. 49, 54-55 (D.Or.1964); *United States v. Schmidt*, 204 F.Supp. 540 (D.Wis.1962)). The court stated that "[o]nly if the government gets something less than or different from that which it expected can it be said to have suffered the kind of injury necessary to invoke FCA liability," *Id.* The court held that the relator failed to state a claim under the False Claims Act because it alleged that "the government knew of those very facts or characteristics which allegedly make the claim false. . . ." *Id.* at 810. Further, the

court rejected the relator's claim that Morton Thiokol's request for an incentive award under its contract terms with NASA was fraudulent because of Morton Thiokol's "failure to adhere to contract requirements." *Id.* at 811. This claim was likewise negated by allegations that the government knew of the alleged defect. *Id.*

The defendant submits a number of affidavits in support of its contention that the Army had knowledge of the defect on which relator's claim was based. Harold G. Heiney, who was design manager in charge of flight controls on the Black Hawk helicopter during the development stage from 1974 to 1981, refers to a number of Army documents attached to his affidavit which indicate that the Army was aware, in 1979, that if pitch control rods were not disconnected, limiter bearings could be damaged. Affidavit of Harold G. Heiney, 10/11/89 ("Heiney Affidavit"), ¶ 2-3; Exhibits 1-2. The Army revised the technical manual provisions for the blade folding operations on the Black Hawk as of May 9, 1980, requiring disconnection of the pitch control rods. Heiney Affidavit, ¶ 4; Exhibit 3. On November 6, 1979, defendant initiated an "Engineering Change Notice" with the Army to change the Fafnir limiter bearing to a solid roller, since the Fafnir bearing could develop cracks. The Engineering Change Notice was signed by the Naval Plant Representative Office ("NAVPRO") representative at defendant's manufacturing plant. Heiney states the signature of the NAVPRO representative is the government's approval for the Engineering Change Notice. Heiney Affidavit, ¶ 5-6; Exhibits 4-5.

William E. Gallagher, project manager of special projects at Sikorsky Aircraft, the division of UTC which developed and manufactured the Black Hawk, was involved in the development and testing of the blade folding equipment on the Black Hawk. Gallagher states that blade fold pins, which the relator contends were the element in the rotor design unilaterally eliminated by the defendant, were not used in the prototype Black Hawk tested and evaluated by the Army in 1976. Affidavit of William, E. Gallagher, 10/3/89 ("Gallagher Affidavit"), ¶ 6. Nor were blade fold pins referred to or employed in the technical manual for the prototype helicopter submitted to the

Army; in the production contract for the Black Hawk; or the equipment in the Air Transportability Kit provided by defendant to the Army as part of the contract. Gallagher Affidavit, ¶ 7-10. The technical manual which details the procedures for blade folding on the production helicopter did not prescribe or mention blade fold pins. Gallagher Affidavit, ¶ 13; Exhibit 6. A pin originally used as a blade fold pin in early prototype models of the Black Hawk was, after 1975, used only as a "rigging pin" for the rigging of controls, and was unrelated to blade folding. Gallagher Affidavit, ¶ 12; Exhibit 5.

The Army concluded tests on the Black Hawk at Fort Campbell, Kentucky on July 11 and July 25, 1979, and addressed, among other questions:

> Can the Black Hawk aircraft be loaded on a C-141/C-5A aircraft in specified quantities and times according to technical manual (TM 55-1520-237-23-4) with organic tools?

The Army's report on these tests, according to Gallagher, shows that the Army had knowledge of the equipment and procedures used in blade folding, and it did not involve the use of blade fold pins. Gallagher Affidavit, ¶ 14; Exhibit 7. Between November 12-18, 1979, the Army conducted a transport exercise, which was attended by United Technologies representatives. During this exercise, the Army and UTC learned that the Fafnir limiter bearing could crack if pitch control rods were not disconnected during the blade folding procedure. Gallagher Affidavit, ¶ 15-16.

Robert E. Hall was chief of the Airframe Branch of the Technical Management Division of the U.S. Army Black Hawk Project Manager's Office from 1975 to 1981. The Project Manager's Office, an arm of the Army Aviation System Command ("AVSCOM"), was responsible for supervision of the "technical configuration" of the Black Hawk helicopter in all respects except the engine. Affidavit of Robert E. Hall, 5/24/90 ("Hall Affidavit"), ¶ 1. Hall states that he was the highest level official at the Project Manager's Office directly involved with management and supervision of Black Hawk air

transportability issues, "including such issues as the compliance of blade fold procedures with Army requirements and all components and equipment used, or proposed by Sikorsky to be used, in blade fold." Hall Affidavit, ¶ 1.

Hall states he was aware, in his capacity as chief of the Airframe Branch, and the most senior official in the Project Manager's Office, that:

> during the Black Hawk prototype phase . . . Sikorsky was considering use of a blade fold pin, in the Black Hawk prototype helicopter, to block blade fold loads out of the mixer assembly. I was also aware during the Black Hawk prototype phase of the operational difficulties inherent in the blade fold pin procedure, specifically that it was difficult to align certain components so that the holes into which the blade fold pins would fit would line up properly. . . .
>
> Sikorsky eventually abandoned the blade fold pin concept. Although I do not remember the precise date when that occurred, I was specifically aware, in my capacity as Chief of the Airframe Branch, of Sikorsky's discarding of the blade fold pin concept, and Sikorsky's reason for doing so, by December 1979 at the latest. Sikorsky did not "secretly" abandon the blade fold pin concept; *the U.S. Army Project Manager's Office understood by December 1979 at the latest (1) that the blade fold pin concept was problematic, (2) that it had been discarded by Sikorsky, and (3) the reason it had been discarded by Sikorsky (namely, the alignment difficulty).*

Hull Affidavit, ¶ 2-3 (emphasis added).

Charles Musgrave was chief of the AVSCOM Technical Management Division in the Project Manager's Office from 1969 to 1985. According to Musgrave, AVSCOM is responsible for development, source selection, airworthiness qualification, and acceptance of aircraft procured by the Army, including the Black Hawk. The Black Hawk Project Manager's Office has had the responsibility for insuring that the Black Hawk was acceptable to the Army and acting upon information

relating to defects in or the safety of the aircraft. Affidavit of Charles Musgrave, 5/24/90 ("Musgrave Affidavit"), ¶ 1. In 1975, during the prototype phase of development of the Black Hawk, Sikorsky decided to raise the rotor head on the helicopter to diminish vibration to the "airframe." This design change made the Black Hawk too tall to fit into the C-141 and C-130 transport aircraft, so the rotor head had to be lowered for transport. The pitch control rods had to be disconnected to lower the rotor head. Musgrave Affidavit, ¶ 2. In December 1979, Musgrave was informed that a problem was discovered when loading the helicopter into the C-5 transport aircraft, which was large enough that the rotor head did not have to be lowered. If the rotor blades were folded without disconnecting the pitch control rods, there was a possibility of damage to the bearing in the mixer assembly. Correspondence identifying the problem was circulated by the Commander of Army Aviation Research and Development Command to all field units using the Black Hawk on December 7, 1979. Musgrave Affidavit, ¶ 4; Exhibit 1.[3]

The relator's claim is based on its contention that defendant, "unilaterally and without government approval, removed an approved design feature on the first production Blackhawk aircraft for its own convenience and then repeated that change on each subsequent aircraft. The change involved the abandonment of the use of circular blade fold pins for blade fold loads because the receptacle holes into which these pins were supposed to be inserted would not line up correctly. Yet Sikorsky falsely claimed and received payment for allegedly fully complying helicopters." Affidavit of Francis G. Fleming, 3/26/90 ("Fleming Affidavit"), ¶ 2. The relator refers the court to a number of documents and deposition testimony it contends contradict some of defendant's contentions, and demonstrate

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3 The relator challenges the use by the defendant of the Hall and Musgrave affidavits, contending that they were improperly obtained since neither individual had permission from the government to testify. The court is persuaded, however, by the arguments submitted by defendant in its memorandum on this issue that the affidavits were properly obtained and may be considered by the court.

that factual questions exist as to the government's knowledge of the alleged defect.

Relator cites deposition testimony by Heiney; Rudolph Huber, a UTC production manager, Luther Folks, a UTC engineer; and George Karas, a UTC employee, which appear to contradict the assertions by Gallagher that the design, prototype model and initial production model Black Hawk's did not use a blade fold pin. Affidavit of Milton G. Sincoff, 5/17/90 ("Sincoff Affidavit"), ¶ 3-11; Exhibits 5-8. Relator also submits the deposition of Ralph Lightfoot, a former chief engineer for Sikorsky, who states that the original Black Hawk design was to incorporate blade folding without disconnecting of any part of the flight control system through the insertion of pins into the control system during blade folding. Affidavit of Ralph Butterworth Lightfoot, 12/15/86 ("Lightfoot Affidavit"), ¶ 13. However, Sikorsky discovered when the first Black Hawk came off the assembly line that the holes designed to accommodate these pins did not line up. Sikorsky then unilaterally abandoned the design concept, rather than attempt to resolve the problem. Lightfoot Affidavit, ¶ 14.

Relator also asserts that defendant did not adequately inform the government of the need for a design change. In fact, the relator claims, the defendant intentionally circumvented the proper Army channels by categorizing its change in the limiter bearings as a "Class II" rather than a "Class I" design change. Sincoff Affidavit, ¶ 15. According to the relator, the defendant was required by Army regulation DOD-STD-480A to notify the government when it discovered the defect in the blade fold pin system of the need for a design change. Sincoff Affidavit, ¶ 15; Exhibit 10. These notifications are to be classified as Class I, which relate to changes which affect function or safety, or Class II, which are less significant engineering changes. *See generally* Sincoff Affidavit, ¶ 15-26. The defendant submitted a Class II Engineering Change Notice in November 1979 notifying the Army of the change from the Fafnir bearing to a roller bearing. By doing so, the relator maintains, the defendant intentionally caused the change to be routed to lower level Army officials instead of higher officials who should be noti-

fied of major design changes. Sincoff Affidavit, ¶ 29-34. This allowed defendant to continue to deliver Black Hawks to the Army without revealing the blade fold pin defect, which would have been costly for defendant to redesign and correct. Sincoff Affidavit, ¶ 38-39.

The submissions on record demonstrate that the original plans for the Black Hawk were to incorporate a blade fold pin, and the Army was aware of this. *See, e.g.*, Plaintiff's Exhibits in Opposition to Defendant's Motion Regarding the Statute of Limitations, Exhibit 4 (Sikorsky's response to Army request for clarification of inspection requirements for folding blades includes reference pins). It is unclear from the documents whether the prototype model Black Hawk or the production model Black Hawk originally used blade fold pins. However, by 1979, the Army BlackHawk Project Manager's Office, responsible for the supervision and management of the entire Black Hawk program, including insuring that the Black Hawk was acceptable to the Army and acting upon information relating to defects, was aware: (1) that during the prototype phase Sikorsky was considering use of blade fold pins; (2) that Sikorsky's original design incorporating blade fold pins was problematic because the blade fold pins would not fit into the production helicopter, and (3) that Sikorsky abandoned the blade fold pin concept. The Army had all of this knowledge by December 1979. *See* Hall Affidavit, ¶ 2-3. The Army became aware in 1979 that if the rotor blades were folded without disconnecting the pitch control rods, that the Fafnir limiter bearing could break, and informed all field units using the Black Hawk of this problem. *See* Musgrave Affidavit, ¶ 4.

The intentional concealment from the Army of the abandonment of the blade fold pin concept is the basis of relator's claim. However, it is clear from the record that the senior Army officials responsible for the Black Hawk program were aware of this problem in 1979. Even if the Hall and Musgrave affidavits are controverted, which they are not by the relator's submissions, relator itself contends that bladefold pins were part of the original Black Hawk design, that blade fold pins were referred to in documents submitted to the Army, and that defen-

dant was required under its contract with the Army to supply Black Hawks with the blade fold pin design. However, none of the helicopters delivered to the Army had blade fold pins, a fact that was obvious to Army officials in 1979. There is no question of fact regarding the Black Hawk Project Manager's Office's knowledge of the alleged defect. Accordingly, the relator has no claim under the False Claims Act, since the government "knew of those very facts or characteristics" which allegedly made Defendant's claims false. *Boisjoly*, 706 F. Supp. at 810.

With respect to relator's tolling argument under section 3731(b)(2), relator contends that "the official of the United States charged with responsibility to act in the circumstances" is the contracting officer who would have received the Class I engineering change notice that should have been submitted by the defendant. Since defendant did not submit the notice, the official charged with responsibility to act in the circumstances was not aware of defendant's abandonment of the blade fold pin design, it can be presumed from relator's argument, until relator commenced this action. The statute of limitations would thus be tolled until that time.

There is no caselaw interpreting this phrase in the statute. However, courts interpreting the analogous tolling provision at 28 U.S.C. § 2416(c)[4] have indicated that once officials who could take action recognize the essential elements of the cause of action, the statute is not tolled. *See United States v. Boeing Co., Inc.*, 845 F.2d 476, 481-82 (4th Cir. 1988); *United States v. Kass*, 740 F.2d 1493, 1497-98 (11th Cir. 1984). The court in *Boeing* rejected the argument that only one Department of Defense contracting officer had responsibility to act on claims for severance pay when several other employees and managers "recognized that a problem existed." *Boeing*, 845 F.2d at 482.

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4 Section 2416(c) provides that, for the purpose of computing limitations periods in actions by the United States, the statute of limitations shall be tolled during the time in which:

> facts material to the right of action are not known and reasonably could not be known by an official of the United States charged with the responsibility to act in the circumstances. . . .

The court here rejects relator's argument that the contracting officer is the only official charged with responsibility to act in the circumstances. The facts materials to relator's cause of action were known in 1979 by the senior officials in charge of the Black Hawk project. Thus, those facts were known, or reasonably should have been known, by officials with the responsibility to act. Presuming, for the sake of argument, that false claims were made to the government, since the argument has been rejected by the court, the statute of limitations began to run in 1979, when payments were made for the first Black Hawks with the allegedly concealed defect. The court is not persuaded by relator's "continuing fraud" theory, i.e., that a fraudulent claim was made with the delivery of each helicopter, since the alleged defect in each helicopter was known to the government in 1979.

With respect to relator's contention that more discovery is needed to demonstrate a lack of knowledge by the government, the relator has been able to submit numerous documents and exhibits to the court on this issue. Further discovery, in the court's opinion, will not enable the relator to controvert the government's knowledge that is clearly established by the existing record.

The defendant's motion for summary judgment on statute of limitations grounds is granted. It is thus unnecessary for the court to consider the remainder of defendant's motions.

Conclusion

Defendant's motion for summary judgment dismissing the complaint on statute of limitations grounds is granted.

IT IS SO ORDERED.